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No. _____

Supreme Court, U.S.
FILED
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

WILLIAM E. CURRIER and
ROBERT C. BRAUN,

PETITIONERS,

VS.

CHARLES J. BALDRIDGE and
ROBERT DALE OSBORN,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was a state standard of individual liability to atone for wrongful arrest breached by summary dismissal of this civil rights violation action?

2. Does an appellate court have power to set a new standard for probable cause to arrest for a criminal charge wherein the accused was acquitted?

3. Has this Appellate Court's refusal to consider unsworn testimonials of Christian activists deprived petitioners of due process of law?

4. Can a process server expect to receive equal protection of the law, i.e. against "unreasonable seizure" by government agents, and the unimpeded "petition for redress" consideration that has been offered others?

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TO THE UNITED STATES COURT
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

WILLIAM E. CURRIER and
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Petitioners,

VS.

CHARLES J. BALDRIDGE and
ROBERT DALE OSBORN,

Respondents.

PETITION FOR WRIT OF CERTIORARI

Petitioners, WILLIAM E. CURRIER and ROBERT C. BRAUN, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit affirming the dismissal of claims of a violation of rights protected by the First, Fourth and Fourteenth Amendments to the United States Constitution by the United States District Court for the Eastern District of Wisconsin.

OPINIONS BELOW

The Opinion of the Court of Appeals is reported as Currier, et al v. Baldridge, et al, 914 F.2d 993 (7th Cir. 1990), and it appears in Appendix A to this Petition. The unpublished written Opinion of the District Court for the Eastern District of Wisconsin appears in Appendix B to this Petition.

JURISDICTION

The Court of Appeals' Opinion in this matter was filed on October 1, 1990. A timely Petition for Rehearing was filed on November 9, 1990. The Court of Appeals denial of the Petition for Rehearing was issued on December 4, 1990, and is set forth in Appendix C to this Petition. This Court's jurisdiction is invoked under Title 28, U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Wisconsin Statute 947.01

"Disorderly Conduct. Whoever, in a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance is guilty of a Class B misdemeanor."

Wisconsin Statute 801.10(1)

"Summons, Who may serve. An authenticated copy of the summons may be served by an adult resident of the state where service is made who is not a party to the action. Service shall be made with reasonable diligence."

United States Constitution
Amendment I

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

United States Constitution
Amendment IV

"The right of the people to be secure in their persons, houses, papers, and effects, against

unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United States Constitution
Amendment XIV, Section 1 -

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The questions presented are interrelated and necessitate consideration of the combined four arguments to grasp the significance of each. The gravity of these issues suggest a need to address them.

QUESTION 1: The court of first instance was informed of the Wisconsin "rule", i.e.:

> "where an authority given by the law is exceeded, the officer loses the benifit of his jurisdiction, and the law holds him as a trespasser ab initio although to a certain extent he acted under the authority given."

Wallner v. Fidelity and Deposit Co. of Maryland, 253 Wis. 66, 70, 33 N.W.2d 215, 216 (1948)

Notwithstanding respondents' failure to address this concept the courts have not addressed petitioners reliance on this rule.

QUESTION 2: Petitioner Currier was acquitted of the initial arrest charge of Disorderly Conduct in which petitioners argued that malicious intent motivated the arrest and compelled the arresting officer to lie and fabricate the only conceivable act that would provide a ground for that criminal complaint criteria, i.e. violence.

Respondents' arguments relied upon Petitioner Currier's conviction on a second charge of Disorderly Conduct to sustain probable cause to arrest on the initial seizure. They did not argue that:

> "Any physical contact within a courtroom between a police officer and a private citizen would tend 'to cause or provoke a disturbance,'..."

This decree established probable cause to arrest for Disorderly Conduct, at least within the Seventh Circuit. The Court of Appeals ruled sua sponte to create that standard.

QUESTION 3: The initial arrest of petitioner Currier was premised on alleged violence. Petitioners provided eye witness declarations contradicting the claim of violence. Boch lower courts have avoided addressing petitioners' arguments regarding fraud in the inducement of the Criminal Complaint, i.e. falsely swearing that violence was grounds for Currier's seizure arrest. The evidence presented by petitioners, via witness declaration, clearly establishes that these allegations are genuine issues to be desided by a fact finder, yet the courts have ignored these affirmed declarations.

QUESTION 4: FACTS: a) Petitioner Currier was a bona fide process server for a party in a civil suit commenced in a Wisconsin Circuit Court when he was arrested by defendant Charles J. Baldridge on February 19th, 1986. b) Defendant Baldridge had ill will toward Nancy Knies,

the party who had commenced the suit for which process was to be served on him. c) Defendant Baldridge had refused mail service of that very process several days prior to February 19th, 1986. d) Nancy Knies had complained to the City of New Berlin Police Chief about Sgt. Charles J. Baldridge's authoritorian and discourteous conduct prior to February 19, 1986. e) Nancy Knies was sitting a few feet from Sgt. Charles J. Baldridge when petitioner Currier served process on him and he retaliated immediately by seizure arrest of the process server. f) Several eye witnesses who observed this confrontation disputed defendant Baldridge's account of the grounds for defendant Currier's arrest. g) These facts were revealed to the courts below and remain in this Case File in the form of personal Asseverations, i.e. unsworn declarations that were notarized by witnesses on affirmation. h) The courts below never

questioned the authenticity of these sincere declarations, or the status of the admissibility of "asseverations" for considerating sufficient evidence to support a jury verdict. i) The Seventh Circuit Appellate Court determined that:

> "Currier has failed to come forward with sufficient evidence that could support a jury verdict in his favor on an element of his claim for which he would bear the burden of proof at trial."

See the October 1st, 1990 Decision, page 6, ¶ 2, in Appendix A. j) Petitioners are frustrated and perplexed over the unanswered questions that have arrisen as a result of the disparity displayed by the courts below and wish to know what laws apply to them and how they may attempt to seek equal protection of the law.

REASONS FOR GRANTING THE WRIT

The Court of Appeals for the Seventh Circuit has rendered a decision so far departed from the accepted and usual

course of judicial proceedings, i.e. created a new probable cause to arrest standard sua sponte wherein the accused had been acquitted, that the Decision enters the sphere of influence concerning federal judicial legislation of state law. By declaring a new probable cause to arrest standard the lower Court circumvented ruling on other arguments propounded by litigants, questions concerning: a) The extent of a witnesses religious freedom to affirm a written declaration rather than to swear to the truth of the matters stated; b) The First Amendment guarantee of protecting an individual's right to petition his government for redress of grievances which may involve "physical contact in a courtroom between a police officer and..." a process server; c) Will the Fourteenth Amendment offer protection to Christian activists whose First and Fourth Amendment protected rights were violated?

QUESTION 7

Was a state standard of individual liability to atone for wrongful arrest breached by summary dismissal of this civil rights violation action?

Petitioner Currier's collateral conviction of the second count of "Disorderly Conduct" has allowed respondents to argue that probable cause to arrest was established for the initial arrest by that conviction, notwithstanding acquittal on the initial count. Petitioners, on the other hand, have argued that the defendant police officers made subsequent arrests, after the initial wrongful arrest, with discrimination and purpose to bolster and lend credibility to the wrongful arrest. An arrest that petitioners have claimed was prompted by vindictiveness against known radicals.

Petitioner Currier's criminal trial jury decided that the arresting officer fabricated violence, i.e. "a punch in the

kidney with fist and papers", when they acquitted him of that initial Disorderly Conduct charge.

Acquittal of that initial arrest charge supports petitioners' claim that fraud in the inducement, by fabricating grounds to issue the initial arrest Criminal Complaint Warrant, is a distinct possibility.

Petitioners have argued on page 6 of their PETITION FOR REHEARING that: "Plaintiffs have alleged 'manufactured evidence', 'false statements in police reports and criminal complaints', 'testifying falsely at the trial', and have claimed conspiracy to cover up police culpability." These allegations were shown to have been made in the original pleadings and that those claims are "ripe for adjudication", contrary to respondents' position that these claims "were fully litigated in state courts."

And on page 8 of that PETITION FOR

REHEARING it was pointed out that:
"...parties being precluded must have had a fair opportunity procedurally, substantially, and evidentially to litigate their claims in the first proceeding and plaintiffs actually lack on all three of those qualifications for collateral estoppal. See Crowell v. Heritage Mutual Insurance Co., 118 Wis.2d 120, __, 346 N.W.2d 327, 331(Ct.App. 1984)." This has not been addressed by the respondent or the lower Court.

The PETITION FOR REHEARING on page 9 showed that: "In Wisconsin collateral fraud destroys the effect of a conviction on the issue of probable cause...Tarantino v. Griebel, 9 Wis.2d 37, __, 100 N.W.2d 350, 352 - 3(Ct.App. 1960)...The controlling case in Wisconsin continues to recognize that perjury or other corrupt motive will destroy collateral [conviction]...Krieg v. Dayton-Hudson Corp., 104 Wis.2d 445, 464, 311 N.W.2d 305..."

And on page 10 of the PETITION FOR REHEARING it was demonstrated that: "The second, third, and fourth tests for issue preclusion established by the doctrine explained in Scherer v. Belkema, 840 F.2d 437, 442(7th Cir. 1988), can not apply in this particular instance, as argued in litigants' briefs (brief cites omitted)". These arguments were not addressed by respondent or the lower Court.

Petitioners have argued in each of their pleadings that the standard set by Wisconsin courts in Wallner v. Fidelity and Deposit Co. of Maryland, 253 Wis. 66, 70, 33 N.W.2d 215, 216(1948) still rules in applying to this case. Wallner said: "The rule is that when an authority given by law is exceeded, the officer loses the benifit of his jurisdiction, and the law holds him as a trespasser ab initio although to a certain extent he acted under the authority given." This concept

was also omitted from respondents' or the lower Court's written considerations.

Sgt. Baldridge's subsequent arrests would become a nullity under the Wisconsin "rule" of Wallner, id., if collateral fraud and purjury could be presented to and determined by fact finders at a trial on the issues. Petitioners are confident that they could easily demonstrate this to be the case to a jury.

The lower Court avoided addressing these arguments by creating a new standard for probable cause to arrest for Wisconsin Statute 947.01!

QUESTION 2

Does an appellate court have power to set a new standard for probable cause to arrest for a criminal charge wherein the accused was acquitted?

An appellate ruling on the issues presented to the lower Court was obviated by the Court's decision, sua sponte, that

probable cause to arrest was obvious at petitioner Currier's initial arrest. Visonary perspective of the scene of the crime (February 19, 1986) aided the Court in determining that Currier's conduct fell within the probable cause criteria that Wisconsin district attorneys should use as grounds to issue a criminal complaint for Disorderly Conduct. The lower Court ruled that:

> "...any physical contact within a courtroom between a police officer and a private citizen would 'tend to cause or provoke a disturbance",..."

And this then is now added to the "or otherwise disorderly conduct..." criteria that is to be construed by prosecuting attorneys when deciding whether or not a complaining witness has sufficient evidence to sustain a charge under §947.01 Wis. Stat., and thereupon issue a criminal complaint.

However, as petitioner pointed out on page 14 of the PETITION FOR REHEARING:

"...the Court's newly adopted standard for probable cause to arrest under §947. 01 Wis. Stat. cannot apply to Currier. The probable cause standard that existed at the time the warrant was issued, February 20th, 1986, must be used as a reference now."..."Whatever sufficiency test was used by the Waukesha County Assistant District Attorney to determine if probable cause existed to charge Currier, if false swearing influenced his belief, then the probable cause is destroyed." Tarantino, id. at 353, Krieg, id. at 464

QUESTION 3

Has the Appellate Court's refusal to consider unsworn testimonials of Christian activists deprived petitioners of due process of law?

This plea for writ of certiorari is based in part upon the lower Appellate Court's written Decision wherein it was claimed:

"Currier has failed to come forward with sufficient evidence that could support an element of his claim for which he would bear the burden of proof at trial."!

Within their PETITION FOR REHEARING to the lower Court, petitioners showed the Court that it was already established in this case file record, by trial court transcript, asseverations, and memorandum argument, that there is a genuine issue of fact in dispute which must be addressed by a fact finder. I.e., the PETITION FOR REHEARING on page 5 states: "Plaintiffs affidavits have established that there is a 'genuine' issue in dispute that, if presented as evidence to a jury, would impugn defendants' allegation that violence prompted [the arrest]". This statement was backed up by excerpts taken from the transcripts of petitioners criminal trials, and from "ASSEVERATION" testimonials (in lieu of affidavits), displayed in the appendix, which allege that the arresting officer, et al, was

lying when he swore to the district attorney who issued the Criminal Complaint that the accused (now the petitioner) had "punched me in the kidney."

The lower Court was apprised in the PETITION FOR REHEARING, page 6 - 7, that: "A genuine factual issue is one that properly can be reached only by a finder of fact. See Anderson v. Liberty Lobby, Inc., 447 U.S. 242, 250 (1986)"... and: "The application of fraud to support a seizure arrest, and the subsequent false swearing to produce a warrant, are available as testimony evidence that is planned for jury presentation." The lower Appellate Court did not address any of these issues when denying the rehearing.

Also not addressed was petitioners' question to the lower Court, on page 10 of the PETITION FOR REHEARING: "Can a court ignore asseverations in lieu of affidavits (on religious grounds) without declaring for the record, the reason

for disallowing them?"...and "Defendants' have provided no affidavits in opposition to plaintiffs' exhibits. Plaintiffs' Exhibit A and B (asseverations in lieu of affidavits) show that two eye witnesses have contradicted the sworn statements by Sgt. Baldridge regarding his cause to arrest Currier and Braun."

Because the lower Appellate Court has failed to address this question, i.e. whether or not petitioners' "ASSEVERATION"(s) were rejected as incompetent testimonials, not qualified for consideration in making their determination, and because it is clear that petitioners' arguments within their PETITION FOR REHEARING clearly meet the standard for reversal and remand for trial, it becomes apparent that the lower Court rejected petitioners' non-party eye witness claims proffered within said "ASSEVERATION"(s).

The issue that is now before this Court, therefore, is to determine whether

or not a so called "asseveration", absent sworn declaration, can be precluded from consideration when a court decides whether or not dismissal on summary judgment is appropriate.

Petitioners and their witnesses have a right to know what rules of law will be applied to them in the future, i.e. if asseverations that are entered within a case file in lieu of affidavits, can be precluded from consideration due to absense of sworn declaration.

QUESTION 4

Can a process server expect to receive equal protection of the law, i.e. against "unreasonable seizure" by government agents, and the unimpeded "petition for redress" consideration that has been offered to others?

Petitioner Currier was dutifully serving court process papers upon the

previously reluctant defendant, Sgt. Charles Baldridge, when that affected police officer retaliated at the moment of service by placing the process server under arrest. The grounds for that arrest were premised on violence, which is the "touching" upon which the future of this case rests. It is clear that the alleged "disturbance" among the municipal courtroom spectators of this confrontation was generated by the arrest of the process server, not the fact that a policeman was served with process papers.

The circuit court branch for which Currier was serving process is in the same building to which he was transported and jailed after his arrest. Criminal charges were placed against petitioners without their consultation. In fact, they were not apprised of the charges brought against them until the duty judge read those charges to them as they stood before him, shackled and in prison

uniform the following day. After challenging the intake court's jurisdiction, Currier was reconfined and, after failing in an attempt from his jail cell to initiate a John Doe proceeding regarding his groundless arrest, he became ill and after spending 23 days in jail, he was hospitalized for a jail induced illness.

After prevailing on the majority of criminal charges brought against them, petitioners filed this civil rights violation action pro se, under the assumption that a process server could expect the same guaranteed protection of rights as an ordinary citizen.

Petitioners were surprised when the Federal District Court ruled that:

> "...none of the plaintiffs were exercising their own rights to petition and they cannot maintain this claim (First Amendment rights violations) on behalf of a third party."

This issue was argued extensively in opposing briefs but not addressed by the

lower Appellate Court whose new probable cause to arrest standart obviated a ruling on those Fourth Amendment protection questions.

This case is unique in the history of published court decisions addressing seizure of a process server. None on record address the viability of a seizure arrest of a process server by the person upon whom service was made.

Petitioners and their activist associates frequently avail themselves the use of §801.10(1) Wis. Stat. to serve process papers in various court actions. Petitioners are now unsure of what, if any, protection they may anticipate from the courts; if not from the very court circuit for which they are acting to give that court jurisdiction, then are they also precluded from seeking redress of grievance, brought about by perceived civil rights violations, in a feceral court action because of their status as

an officer of a state court?

As it appears now, a process server can not expect First Amendment guaranteed protection in the realm of petition for redress of grievance. And the unlawful seizure of a process server claim will be very difficult to sustain because of the liberal treatment allowed for establishing grounds of probable cause to arrest for the crime of Disorderly Conduct.

Petitioners adjure this Court to recognize its responsibility to address these issues and clarify the areas of confusion generated by this action.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Court of of Appeals for the Seventh Circuit in this matter.

If this Court elects not to address

the issues presented herein at the present time, it is requested that the writ issue and the matter be remanded to the Court of Appeals for the Seventh Circuit for redetermination of the issues not addressed as shown herein.

DATED: February ___, 1991.

Respectfully submitted,

_____

William E. Currier, pro se

_____

Robert C. Braun, pro se

90-1392

No. _____

Supreme Court, U.S.
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APPENDIX TO THE PETITION

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 89-2995

WILLIAM E. CURRIER and ROBERT C. BRAUN,

Plaintiffs-Appellants,

v.

SERGEANT CHARLES J. BALDRIDGE, and CORPORAL ROBERT D. OSBORN, police officers of the New Berlin Police Department and all those acting in concert on conspiracy therewith.

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Wisconsin. No 88 C 191 - Thomas J. Curran, Judge

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ARGUED APRIL 12, 1990
Decided October 1, 1990

Before BAUER, Chief Judge, CUMMINGS and WOOD, Jr. Circuit Judges

WOOD, Jr., Circuit Judge. Plaintiffs William E. Currier and Robert C. Braun profess to be members of the American Heritage Forum ("AHF"), an organization apparently dedicated to the propagation of litigation. What the organization's goals

are or whether such an organization even exists are matters of some dispute, but at this stage of the litigation, we must draw factual inferences in favor of the plaintiffs. The plaintiffs characterize AHF as a non-violent affiliation of Christians that desire a return to "America's common law heritage." To throw off the manacles of burdensome governmental regulation, AHF members have refused to register their cars with the state of Wisconsin.

AHF member Nancy Knies dutifully refused to register her automobile, and like many who practice civil disobedience, suffered the consequences. In his capacity as a police sergeant for the city of New Berlin, Wisconsin, defendant Charles J. Baldridge arrested Knies and impounded her car. The record becomes unclear, but at some point Knies brought legal proceedings to gain return of her car, naming Baldridge and a Wisconsin judge as defen-

dants.

Leaving Knies for the moment, we move to the plight of another AHF member, Al Feustel, on the night of February 19, 1986. Feustel was in court that night, challenging a traffic charge, and a number of AHF members had accompanied him. Among the AHF members present in the courtroom were Knies, plaintiff Currier, and plaintiff Braun. Defendant Baldridge was serving as the courtroom bailiff, and Knies wanted to seize this opportunity to serve him with legal papers connected to her case. The exact content of these papers is unknown but is of little consequence given our disposition of this case.

Knies enlisted Currier to serve the papers on Baldridge, and Currier dutifully complied. Currier confronted Baldridge in the courthouse hallway, but Baldridge, aware of AHF members' litigious propensities, wanted nothing to do with him. Undaunted, Currier made a second attempt at

service, this time inside the courtroom. Currier approached Baldridge from the rear, struck him with the legal papers, let the papers drop to Baldridge's feet, and declared, "You are served." Baldridge turned around and responded, "You are under arrest."

Currier initially darted away from Baldridge, but he quickly changed his mind and submitted to the arrest. The other defendant, police corporal Robert D. Osborn, joined the scene at this moment, assisting Baldridge with Currier's custody. Baldridge and Osborn then moved Currier into a conference room located just off the courtroom. After other officers had joined them, Baldridge and Osborn tried to transport their prisoner to the police station.

Baldridge and Osborn did not even get outside of the courtroom before trouble broke out. While being escorted by two other police officers and in front of a

number of AHF members, Currier slumped to the courtroom floor with a loud groan. At this point, plaintiff Braun asserted himself, exhorting the officers not to hurt his fellow AHF member. The parties dispute who was the aggressor, but it is undisputed that a frey then ensued, for which Braun was charged with disorderly conduct.

For his actions that night, Currier was charged with one count of obstructing a police officer and two counts of disorderly conduct. Currier's disorderly conduct charges stemmed first from his initial actions in striking Baldridge with the legal papers and second from his incitement of the courtroom crowd by dropping to his knees and groaning. Currier was convicted only for the second disorderly conduct count. Braun was also convicted on his disorderly conduct charge.

Currier and Braun are now in federal court with this section 1983 action

against the police officers responsible for their arrests that night. The district court dismissed all of the plaintiffs' complant. On appeal, we are left only with Baldridge and Osborn as party defendants and, despite characterizations to the contrary in plaintiffs' somewhat opaque brief, with only two claims for adjudication. First, the plaintiffs charge a violation of their first amendment rights to free speech, petition, and assembly for the defendants' willful interference with their ability to engage in group litigation. Second, the plaintiffs charge a violation of their fourth amendment rights for wrongful arrest. Of course, both of these rights apply to this case through their incorporation in the fourteenth amendment.

As to their first amendment claim, the plaintiffs assert that AHF was using Knies's suit as a vehicle to protest Wisconsin's oppressive automobile regis-

tration laws. The Supreme Court has recognized a "common thread running through our decisions...is that collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." United Transp. Union v. State Bar, 401 U.S. 576, 585(1971). The plaintiffs' attempts to characterize Knies's replevin action as litigation is search of political change devalue the truly important social contexts in which this right has arisen. See, e.g., Brotherhood of R.R. Trainmen v. Virginia, 377 U.S. 1(1964); NAACP v. Button, 371 U.S. 415(1963). Although the first amendment does not place relative values on various groups' ideologies, there are still limits to its guarantees, and the plaintiffs' desire to aid Knies in private litigation for the recovery of her personal automobile may fall outside the scope of the amendment's protections. We need not de-

cide this issue, however, because even if applicable to this case, the plaintiffs have failed to show how the defendants burdened this right.

The plaintiffs allege that Baldridge arrested Currier while he was trying to serve legal process on Baldridge, and thus the arrest may appear to have hindered the Knies litigation. Despite Currier's arrest, however, the attempt at process was still effective; for service of process on recalcitrant defendants, Wisconsin accepts the general method of placing a summons in the general vicinity of the person to be served and announcing the nature of the papers. Aee Borden v. Borden, 63 Wis. 374, 377, 23 N.W. 573, 574 (1885); In re Guardianship of K.N.K., 139 Wis.2d 190, 214-15, 407 N.W.2d 281, 292(Wis. Ct. App. 1987); see also Hatmaker v. Hatmaker, 337 Ill. App. 175, 182, 85 N.E.2d 345, 348 (1949); Union Nat'l Bank v. Pacamor Bearings, Inc., 132 Misc.2d 269, 503

N.Y.S.2d 671, 672(Sup. Ct. 1986); Chernick v. Rodriquez, 2 Misc.2d 891, 150 N.Y.S.2d 149, 150(Sup. Ct. 1956); Flex Credit, Inc. v. Winkowitsch, 428 N.W.2d 236, 239(N.C. 1988); Nielsen v. Braland, 264 Min. 481, 484, 119 N.W.2d 737, 739(Minn. 1963). Nothing that Baldridge did burdened the ability of the plaintiffs to engage in group litigation. The plaintiffs have not pointed to any obstacles that Currier's arrest placed in the path of their desire to pursue judicial remedies as a means of social change.

As an alternative, plaintiffs Braun and Currier might claim that Currier's arrest "chilled" their desire to support AHF's litigation efforts, but this theory is better analyzed under the plaintiffs' fourth amendment claims for wrongful arrest. If the arrests were supported by probable cause, then the plaintiffs have no cause of action, under the first amendment or otherwise.

We turn first to Braun's wrongful arrest claim because it is the least complicated. Braun was arrested for and convicted of disorderly conduct for interfering with the police as they led Currier out of the courtroom. The conviction supports the arrest: a plaintiff's previous conviction collaterally estops the plaintiff from reasserting a lack of probable cause. Allen v. McCurry, 449 U.S. 90(1980). The existence of probable cause bars the section 1983 action. Kompare v. Stein, 801 F.2d 883, 891 (7th Cir. 1986).

Currier's wrongful arrest claim is more problematic. Currier was initially arrested for his attempt to serve legal papers on officer Baldridge, but Currier was only convicted for his disorderly conduct after his arrest and as he was being led from the courtroom. Thus, Currier was charged with two counts of disorderly conduct, but only convicted of one. Contrary to the defendants' assertion, the convic-

tion does not collaterally estop Currier from asserting the invalidity of his initial arrest.

At a preliminary hearing, a Wisconsin state court presumably made a finding that Currier's initial arrest was supported by probable cause. If such a finding was made in the course of Currier's criminal case, it might work a collateral estoppel against him. See Guenther v. Holmgreen, 738 F.2d 879, 883-89(7th Cir. 1984), cert. denied, 469 U.S. 1212 (1985). Nevertheless, the defendants have not chosen this route, instead resting their collateral estoppel argument solely on the effects of Currier's conviction. Collateral estoppel, like a lot of issues in this court, can be waived. See Blondel-Toungue Laboratories v. University of Ill. Found., 402 U.S. 313, 350 (1971); West Virginia N. R.R. v. United States, 391 F.2d 627, 636 (Ct. Cl.1968). The defendants did not raise the collateral estoppel effects of

preliminary proceedings in Currier's criminal case, and neither will we.

However, the mere fact that Currier was acquitted of the crime for which he was initially arrested does not lead to section 1983 liability for the arresting officer. See Baker v. McCollan, 443 U.S. 137, 145 (1979); Pierson v. Ray, 386 U.S. 547, 555 (1967). As we noted above, if the arrest was supported by probable cause, then no cause of action will lie. While Currier disputes the exact chain of events that led to his arrest, his claim falls within the language of Celotex Corp. v. Catrett, 477 U.S. 317, 323-324 (1986), and Anderson v. Liberty Lobby, Inc., 447 U.S. 242, 249-50 (1986). Currier has failed to come forward with sufficient evidence that could support a jury verdict in his favor on an element of his claim for which he would bear the burden of proof at trial. The evidence is undisputed that Currier made physical contact with Baldridge as

he attempted to serve the officer with legal papers. Currier quibbles with the defendants' characterization of this contact as a "striking," but any physical contact within a courtroom between a police officer and a private citizen would tend "to cause or provoke a disturbance" as the state of Wisconsin has defined disorderly conduct. Wis. Stat. §947.01. Because Currier's conduct occurred in the presence of the defendants, they had probable cause to arrest him.

The plaintiffs have shown no constitutional right that the defendants violated. Accordingly, the judgment of the district court is AFFIRMED.

A true Copy:
Teste:

Clerk of the United States
Court of Appeals for the
Seventh Circuit

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

WILLIAM E. CURRIER,
ROBERT C. BRAUN, and
RICK G. ALTHISER,
Plaintiff,

v. Case No. 88-C-191

SGT. CHARLES J. BALDRIDGE,
CPL. ROBERT D. OSBORN,
PTM. THOMAS T. STRUEBING,
SGT. CHARLES D. SCHROEDER, and
PTM GREGORY FRIBERG, police
officers for the New Berlin
Police Department and all
those acting in concert on
conspiracy therewith,
Defendant.

file stamped June 15, 1989

DECISION AND ORDER

Plaintiffs William E. Currier, Robert C. Braun and Rick G. Althiser have commenced the above-captioned case against five police officers of the City of New Berlin (Wisconsin): Charles J. Baldridge, Robert Osborn, Thomas Struebing, Charles Schroeder and Gregory Friberg. In their Second Amended Complaint the plaintiffs assert four causes of action against the defen-

dant pursuant to 14 U.S.C. § 1983. They allege that the defendants deprived them of rights guaranteed by the First Amendment to the United States Constitution; that the defendants arrested them without probable cause to keep them from exercising their First Amendment rights and in violation of the Fourth and Fourteenth Amendments; that the defendants used unreasonable force in effecting their arrests in violation of the Fourth and Eighth Amendments; and that the defendants defamed them by issuing a false press release.[1] Currier, Braun and Althiser are seeking actual, general and punitive damages, as well as attorney fees, for their injuries. If the plaintiffs have alleged justiciable constitutional claims, this court would have jurisdiction over the subject matter of these claims pursuant to 28 U.S.C. §§1331 and 1343(a).

The defendants answered, denying liability and asserting the defense of im-

munity. After the deadline for the completion of all discovery of fact witnesses had passed, defendants moved for summary judgment. See Federal Rule of Civil Procedure 56. This motion is now fully briefed and ready for decision.

I. FACTS

Although the parties disagree as to many of the details of the events which gave rise to the plaintiffs' claims, undisputed portions of the record establish the material contours of the events of the arrests and subsequent trials of Currier, Braun and Althiser.

On February 19, 1986, the three plaintiffs traveled to the New Berlin Municipal Building to watch a hearing on a traffic charge against Alfred Feustel. Officer Baldridge was present in the dual capacity of witness and bailiff.

In the courtroom Currier twice

attempted to serve papers on Baldridge for a civil case involving a third person - Nancy Knise. During the second attempt Currier struck Baldridge with the papers. Baldridge then told Currier he was under arrest. Currier attempted to retreat but was apprehended and handcuffed by Baldridge and placed in a conference room. As police officers attempted to take Currier out of the Municipal Building, Currier dropped to the floor. Braun shouted at the police to stop hurting Currier, then Braun was arrested for allegedly pushing or shoving the officers. Officers Baldridge and Osborn pinned Braun to the floor, then handcuffed him and placed him in the conference room. When Althiser attempted to enter the conference room, he was commanded to halt by Officer Struebing. After Althiser swung his fist at Officer Struebing the police attempted to arrest him. Althiser resisted, so Officers Struebing, Osborn, Baldridge and Schroe-

der joined in the effort to subdue him. During the fray, Officer Friberg retrieved a knife from the floor which had been in Althiser's hand. Althiser claims that he was struck on the head. It is undisputed that Officer Schroeder administered a pain compliance technique which enabled Officer Friberg to handcuff Althiser.

Following the arrests, all three defendants were temporarily detained in the Waukesha County Jail. Braun and Althiser, who claimed to have been injured, were taken to a hospital where they were examined by medical personnel.

Currier, Braun and Althiser were tried separately. Based on the events of February 19, Currier was charged with two counts of disorderly conduct and one count of obstructing an officer. He was found guilty of one count of disorderly conduct. Braun was charged with two counts of disorderly conduct, one count of resisting arrest, and one count of criminal

damage to property. He was found guilty of one count of disorderly conduct. Althiser was charged with one count of disorderly conduct and one count of resisting arrest. He was found guilty of one count of disorderly conduct.

II. LEGAL STANDARDS FOR SUMMARY JUDGMENT

Under Federal Rule of Civil Procedure 56(c), parties moving for summary judgment must show that the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving parties are entitled to a judgment as a matter of law. See Celotex Corporation v. Catrett, 477 U.S. 317, 322 (1986); McGraw-Edison Company v. Walt Disney Productions, 787 F.2d 1163, 1167 (7th Cir. 1986). When faced with a properly supported motion for summary judgment, the

nonmovants may not avoid judgment by simply resting on their pleadings. If the nonmovants bear the burden of production on an issue at trial, they must affirmatively demonstrate, by specific showings, that there is a genuine issue of material fact requiring a trial. See First National Bank of Cicero v. Lewco Securities Corporation, 860 F.2d 1407, 1411 (7th Cir. 1988).

A "genuine" factual issue is one that properly can be resolved only by a finder of fact because it may reasonably be resolved in favor of either party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). A summary judgment procedure is not meant to be a trial on affidavits. "Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . . The evidence of the non-movant is to be believed, and all justifiable in-

ferences from the facts are to be drawn in in his favor." Anderson, 477 U.S. at 255. At the summary judgment stage the judge's function is to determine whether there is sufficient evidence favoring the nonmoving parties for a jury to return a verdict for that party. See First National Bank of Arizona v. Cities Service Company, 391 U.S. 253, 288-89 (1968). This inquiry implicates the substantive evidentiary standard of proof that would apply at a trial on the merits. Thus, in a civil case such as this, the record must show that a jury could find by a preponderance of the evidence that the parties upon whom the burden of proof is imposed are entitled to a verdict in their favor. See Anderson, 477 U.S. at 252. If the parties' evidence is merely colorable, or is not significantly probative, summary judgment may be granted. See Id. at 249-50.

"As to materiality, the substantive law will identify which facts are material.

Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248. "Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corporation v. Catrett, 477 U.S. 317, 322 (1986).

The Supreme Court has emphasized that, even where intent or motive is at issue, the nonmovants cannot rest on their pleadings, but must present affirmative evidence, even where the evidence is likely to be within the possession of the defendants, as long as the plaintiffs have had a full opportunity to conduct dis-

covery. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986).

III. DISCUSSION

In the instant case the defendants argue they are entitled to summary judgment as a matter of law on the following grounds: the doctrine of issue preclusion bars the plaintiff from relitigating the issues of probable cause and excessive force; the police officers are entitled to qualified immunity; the plaintiffs cannot meet their burden of showing that any of the alleged constitutional deprivations caused any compensable injury; the police officers have absolute immunity for their roles in the underlying criminal cases; and, the plaintiffs cannot support their claims of conspiracy. If the court does not grant summary judgment as to all claims, the defendants ask that the trials of the plaintiffs be severed.

A. FIRST AMENDMENT CLAIMS

The plaintiffs say that the core issue of this case is whether they were arrested for exercising their First Amendment rights to assemble peaceably and to petition for a redress of grievances because the defendants "were sick and tired of dealing with AHF [American Heritage Forum][2] members and their litigious propensities." Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment at 2.

Officer Baldridge has admitted that he was "fed up" with receiving legal papers from associates of the plaintiffs. See Affidavit of Timothy J. O'Brien at Exhibit F, p. 167. Nevertheless, neither this admission nor any other evidence introduced by the plaintiffs shows that the defendants were motivated by an intent to deprive the plaintiffs of their First Amendment rights when they arrested and

subdued them on February 19, 1986.

As a threshold matter, it is not clear that Currier, Braun or Althiser have standing to raise a claim that their right to petition was violated when Currier tried to serve papers on Officer Baldridge. The papers were for a case involving Nancy Knies and neither Currier nor Braun nor Althiser were parties to that case. Therefore, none of the plaintiffs were exercising their own rights to petition and they cannot maintain this claim on behalf of a third party. Moreover, the record shows that Currier made two attempts to serve Officer Baldridge. He was arrested after the second attempt only because he struck Officer Baldridge. The First Amendment does not protect illegal acts such as disorderly conduct or striking a police officer merely because the actor claims to be attempting to serve legal papers. Cf. United States v. O'Brien,, 391 U.S. 367, 376 (1968);

State v. Minniecheske, 118 Wis.2d 357, 360, 347 N.W.2d 610, ___(Ct. App. 1984).

The plaintiffs also attempt to imply that the defendants came to the hearing for the purpose of frustrating the efforts of the plaintiffs to assemble and to serve papers. Given the uncontroverted facts in the record, this inference is not reasonable. Officers Baldridge and Osborn were at the New Berlin Municipal building on the night in question to serve as witnesses at the Feustal hearing. The other officers were called to the scene by a city employee when the disturbance erupted. Although Officer Baldridge was aware of Nancy Knies and some of her associates, there is no evidence that the defendants had any knowledge of the identity or ideology of Currier, Braun or Althiser prior to February 19, 1986. Furthermore, on that evening all the contacts which led to the arrests were initiated by the plaintiffs.

The plaintiffs have not produced a scintilla of evidence or even raised a reasonable inference that protected conduct was a motivating factor in their arrests. See Mount Healthy School Disdistrict, Board of Education v. Doyle, 429 U.S. 274, 287 (1977); Nekolny v. Painter, 653 F.2d 1164, 1167 (7th Cir. 1981), cert. denied, 455 U.S. 1021 (1982). Therefore, summary judgment must be granted in favor of the defendants on the First Amendment claims. See Rakovich v. Wade, 850 F.2d 1180, 1210 (7th Cir.)(en banc) (merely conclusory allegations of unconstitutional motive, devoid of factual support, must be found lacking and be dismissed), cert. denied, 109 S.Ct. 497 (1988). In addition, because the plaintiffs have failed to establish any underlying claim that the defendants conspired to deprive them of their rights to assemble and to petition for a redress of their grievances.

B. FOURTH AMENDMENT CLAIMS

1. Arrest and Detention

In their Second Amended Complaint, the plaintiffs claim that they were "arrested, seized and detained from their liberties without probable cause, absent any reasonably objective belief as to same and with specific intent to frustrate and discourage Plaintiffs from the exercise of their FIRST AMENDMENT rights--contrary to their rights secured via the FOURTH AMENDMENT applicable to them via the said FOURTEENTH AMENDMENT clauses aforesaid." Second Amended Complaint at ¶ 26. The court has already determined that the First Amendment claim is without merit. Moreover, whether an arrest was reasonable must be judged objectively, without regard to underlying intent or motivation. See Graham v. Connor, 109 S.Ct. 1865, 1872 (1989). Thus, the ques-

tion before the court is whether the defendants had probable cause to arrest Currier, Braun and Althiser on February 19, 1986.

As the defendants point out, the existence of probable cause is an absolute bar to a section 1983 claom arising out of an arrest or pretrial detention regardless of the lack of good faith or malicious motives on the part of the law enforcement officers. See Bergren v. City of Milwaukee, 811 F.2d 1139, 1142 (7th Cir. 1987); Kompare v. Stein, 801 F.2d 883, 891 (7th Cir. 1986). In this case the record shows that each of the three plaintiffs was arrested by one or more of the defendants and that each of the plaintiffs was subsequently convicted by a jury of one count of disorderly conduct.[3] After being found guilty, the plaintiffs appealed their convictions to the Wisconsin appellate courts. The judgment of the trial court was affirmed in each case.

Once probable cause has been actually litigated, found, and made part of a final judgment, the doctrine of collateral estoppel applies. Under this doctrine a federal court must give the same preclusive effect to a state court ruling as would a court in the rendering state. See Migra v. Warren City School District Board of Education, 465 U.S. 75, 81 (1984). Therefore, the Wisconsin rules governing collateral estoppel apply to this case. Wisconsin law bars parties from relitigating issues that were "litigated, determined, and necessary to the decision in the prior proceeding." Reckner v. Reckner 105 Wis.2d 425, ___, 314 N.W.2d 159, 165 (Ct. App. 1981) (citing State ex rel. Flowers v. Department of Health & Social Services, 81 Wis.2d 376, ___, 260 N.W.2d 727, 734 (1978)). Wisconsin courts do not require a mutuality of parties where collateral estoppel is "asserted defensively to prevent a party from reliti-

gating an issue which has been conclusively resolved against that party in a prior case." Crowell v. Heritage Mutual Insurance Company, 118 Wis.2d 120, ___, 346 N.W.2d 327, 330 (Ct. App. 1984). Therefore, Wisconsin would give preclusive effect to state court determinations on issues that were: (1) identical; (2) actually litigated; and (3) necessary to the state court's final judgment. See Schneider v. Mistele, 39 Wis.2d at ___ n.5, 158 N.W.2d 383, 384 n.5 (1968); Reckner, 105 Wis.2d at ___, 314 N.W.3d at 165. A corollary to these requirements is that the parties being precluded must have had a fair opportunity procedurally, substantively, and evidentially to litigate their claims in the first proceeding. See Crowell, 118 Wis.2d at ___, 346 N.W.2d at 331.

In this case the fact that the Waukesha County Circuit Court juries found sufficient proof of all the elements neces-

sary to convict each of the plaintiffs of disorderly conduct establishes that the defendants had probable cause to arrest Currier, Braun and Althiser. Nevertheless, the three plaintiffs attempt to escape claim preclusion by contending that they were not afforded a full and fair procedural opportunity to contest the issue of probable cause during their trials and that they were unfairly prejudiced by court rulings "which effectively would not let the plaintiffs bring in evidence relating to past conduct of the officers towards members of AHF. The individual defendants were also not able to present to their respective juries all facts of the encounter of February 19, 1986, as the court limited each defendant only to the incidents which involved that particular plaintiff." Plaintiffs' Brief in opposition to Defendants' Motion for Summary Judgment at 2. They say that:

> The plaintiffs assert that there is abundant reason to doubt the fairness of the state court proceedings to which they were subjected. Despite repeated requests, the state circuit courts refused plaintiffs' request to consolidate their cases. The juries in each case therefore did not have the benefit of hearing about the interrelationship between each arrest. The plaintiffs also did not have the opportunity to raise the issue of the denial of First Amendment rights as the reason behind their arrests. The juries in the criminal cases were not aware of the animosity of the defendants towards persons in the American Heritage Forum.

Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment at 10.

In replying to the plaintiffs' arguments, the defendants point out that the consolidation motions brought by Braun and Currier were considered several times by the state courts and were denied because of procedural errors. See April 21, 1989 Affidavit of Raymond J. Pollan at Exhibit T, pp 10-14.

The defendants also note that Braun and Currier did not challenge these rulings in their appeals and that plaintiff Althiser never moved for consolidation.

Parties opposing a defense of claim preclusion on the ground that they were denied a full and fair procedural opportunity to litigate an issue must establish that they did not have the incentive to litigate the issue vigorously in the first action; or that there is a substantial difference in the procedures available in the two actions; or that effective litigation was limited by the nature of the relationship among the parties to the first action. See 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure: Jurisdiction § 4423 (1981). The only federal requirement is that the prior state proceedings must have satisfied the minimal procedural requirements of the Due Process Clause. See Leal v. Krajewski,

803 F.2d 332, 334 (7th Cir. 1986)

The plaintiffs meet none of these tests. A mere showing that the Waukesha County Circuit Court, in the exercise of its discretion, denied their consolidation motions and did not admit all the evidence they attempted to present does not lead to the conclusion that their state court trials were procedurally deficient or fundamentally unfair. The plaintiffs have given this court no reason to doubt that they had a full and fair procedural opportunity to litigate the issue of probable cause in their state court trials.

The plaintiffs also assert that:

> There are also serious questions presented regarding the integrity of the evidence used to obtain convictions of plaintiffs. Plaintiff Currier attempted to challenge the integrity of the evidence of various pretrial hearings, including a probable cause hearing, but he was denied the opportunity. When Mr. Currier tried to explain that he was merely serving legal process, Judge Murphy responded, "We are

> not here to try the case today . . . Whether there was legal service of process appears to me to have no bearing on whether there was sufficient probable cause for the complaint to contain the three allegations."

Id. at 11 (citation omitted). Such challenges to the integrity of evidence presented at pretrial hearings can be maintained only when a party is ultimately acquitted or not tried on a charge. See e.g., Bailey v. Andrews, 811 F.2d 366, 370 (7th Cir. 1987). In this case, because all three plaintiffs were convicted of disorderly conduct at full-fledged trials, their inability to challenge the integrity of the evidence at the pretrial hearings is irrelevant.

In sum, the plaintiffs have failed to show that they were denied a full and fair opportunity to litigate the issue of probable cause at their state criminal trials. Therefore, they collaterally estopped from relitigating in this lawsuit the issue of whether the defendants

had probable cause to arrest them. Accordingly, the court will grant summary judgment in favor of the defendants on the claims for arrest and detention without probable cause.

2. Excessive Force

For their Third Cause of Action the plaintiffs allege that:

> [T]he respective Defendants did intentionally and willfully perpetrate a battery and did use unreasonable and unnecessary force in the seizure of each said Plaintiff with malicious intent to injure Plaintiffs and cause them to incur such bodily injury, associated pain and suffering, reasonable and necessary medical costs and, as to Plaintiff BRAUN, an increased permanency to his prior physical disability--contrary to said Plaintiffs' respective rights secured for them pursuant to said FOURTH AMENDMENT and the EIGHTH AMENDMENT guarantees against cruel and unusual punishment as applicable to them by and further pursuant to the Due Process and Equal Protection clauses of said FOURTEENTH AMENDMENT.

Second Amended Complaint at ¶27.

Recently, the United States Supreme Court held that: Where an excessive force claim arises in the context of an arrest of a free citizen, "it is most properly characterized as one invoking the protections of the Fourth Amendment, which guarantees citizens the right 'to be sucure in their persons . . . against unreasonable . . . seizures' of the person." Graham v. Connor, 109 S.Ct. 1865, 1871 (1989). See also Lester v. City of Chicago, 830 F.2d 706, 713 (7th Cir. 1987). Consequently, the plaintiffs in this case can make a viable excessive force claim only under the Fourth Amendment and their claims under the Eighth and Fourteenth Amendments must be dismissed.

In moving for summary judgment on the remaining portion of the plaintiffs' Third Cause of Action, the defendants argue that the plaintiffs are collaterally estopped from relitigating the

issue of whether the New Berlin police officers used excessive force. However, the movants have failed to meet their burden of showing that a resolution of the issue of whether the force used in making the arrests was reasonable was necessary to the judgments of conviction in the prior actions. It appears that this issue was not determined because Currier was charged, but not convicted, of obstructing an officer; Braun was charged, but not convicted, of resisting arrest; and Althiser was charged, but not convicted, of resisting arrest. The disorderly conduct convictions did not necessitate findings that the officers used only reasonable force in effecting the arrests. Therefore, the plaintiffs are not collaterally estopped from litigating the excessive force issue.

Next, the defendants argue that they are entitled to qualified immunity from

a suit for money damages on the excessive force claims because they acted reasonably under the circumstances and did not use greater force than was necessary to make the arrests. To determine whether police officers are entitled to qualified immunity, a court must conduct a two-part analysis by asking: (1) Does the alleged conduct set out a constitutional violation? and (2) Were the constitutional standards clearly established at the time in question? See Wade v. Hegner, 804 F.2d 67, 70 (7th Cir. 1986)

In general, an officer who uses excessive force to arrest a person has unreasonably seized that person in violation of the Fourth Amendment. See Lester, 830 F2d at 713. In this case it is undisputed that the defendants used force. The question is whether the manner or degree of force was reasonable. Arriving at an answer involves

carefully balancing "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." Graham, 109 S.Ct. at 1871 (citations omitted). However, the "'test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,' . . . its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers of(sic) others, and whether he is actively resisting arrest or attempting to evade arrest by flight." Id. at 1871-72 (citations omitted).

In the instant case the court has determined that the defendants had probable cause to arrest the plaintiffs for the misdemeanor of disorderly conduct.

It is also undisputed that all three plaintiffs resisted or attempted to evade arrest. But, in all other respects, the facts relevant to the excessive force in arresting them in violation of their rights guaranteed by the Fourth Amendment. The plaintiffs' claims in the Third Cause of Action that the defendants deprived them of rights guaranteed by the Eighth and Fourteenth ARE DISMISSED on their merits.

It is FURTHER ORDERED that the plaintiffs' Fourth Cause of Action is DISMISSED on its merits. See Federal Rule of Civil Procedure 12(b)(6).

Done and Ordered in Chambers at the United States Courthouse, Milwaukee, Wisconsin this 15th day of June, 1989.

Thomas J. Curran
United States District Judge

FOOTNOTES

Footnote /1 from page 15.

In their response to the summary judgment motion the plaintiffs have stated that: "Based upon the factual development of the case, and the applicable case law, plaintiffs would agree that dismissal of their pendent state claim of defamation would be authorized." Plaintiffs' Brief in Opposition to Defendants' Motion for summary Judgment at 1. Therefore, this claim will not be considered.

Footnote /2 from page 24.

According to the Plaintiffs the American Heritage Forum is:

> . . . an active Christian group which emphasizes non-violent protest techniques and a return to America's common law heritage. The group believes that contemporary statutory enactments and judicial proclamations do not comport with the original vision of the drafters of the United States and Wisconsin Constitutions. Members of AHF feel it is their duty to challenge the authority granted government by present day statutes and

> judicial decisions. To that end, AHF members often assemble peaceably for the purpose of petitioning governmentsl bodies to listen to their grievances. Their primary methods of presenting challenges to government authority are peaceful demonstrations and court challenges to their arrests.

[Plaintiffs'] Statement of Afcts at 1.

Footnote /3 from page 29.

The fact that each of the plaintiffs was acquitted of additional charges does not have any bearing on the probable cause issue.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

DECEMBER 4, 1990

Hon. WILLIAM J. BAUER, Chief Judge

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. HARLINGTON WOOD, JR., Circuit Judge

No. 89-2995

WILLIAM E. CURRIER and ROBERT C. BRAUN, Plaintiffs-Appellants, vs. SERGEANT CHARLES J. BALDRIDGE, and CORPORAL ROBERT D. OSBORN, police officers of the New Berlin Police Department and all those acting in concert on conspiracy therewith, Defendants-Appellees.	Appeal from the United States District Court for the Eastern District of Wisconsin No. 88 C 191 Thomas J. Curran, Judge.

ORDER

On consideration of the petition for rehearing with suggestion for rehearing in banc filed in the above-entitled cause

by plaintiffs-appellants William E. Currier and Robert C. Braun on November 9, 1990, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing with suggestion for rehearing in banc be, and the same is hereby, DENIED.

Supreme Court, U.S.
FILED
MAR 22 1991
OFFICE OF THE CLERK

(3)

No. 90-1392

In The

Supreme Court of the United States

October Term, 1990

WILLIAM E. CURRIER and ROBERT C. BRAUN,

Petitioners,

vs.

CHARLES J. BALDRIDGE and ROBERT D. OSBORN,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I. Whether petitioners may maintain claims that their arrests were wrongful where probable cause was found to exist by reviewing courts.

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No. 90-1392

In The

Supreme Court of the United States

October Term, 1990

WILLIAM E. CURRIER and ROBERT C. BRAUN,

Petitioners,

vs.

CHARLES J. BALDRIDGE and ROBERT D. OSBORN,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

OPINIONS BELOW

The petitioners seek a writ of certiorari from an opinion of the United States Court of Appeals for the Seventh Circuit filed on October 1, 1990 [Petitioners' Appendix, pp. 1-13; 914 F.2d 993 (7th Cir. 1990), Rehearing denied December 4, 1990], which had affirmed a decision and order of the United States District Court for the Eastern District of Wisconsin filed on June 15, 1989 [Petitioners' Appendix, pp. 14-44].

STATEMENT OF CASE

This case involves the arrest of William Currier and the arrest of Robert Braun at the New Berlin Municipal Courtroom on February 19, 1986. As a consequence of the events on that day, Currier was convicted of disorderly conduct on October 10, 1986. On January 30, 1987, in a separate trial, Braun was also convicted of disorderly conduct.

William Currier

On February 19, 1986, William Currier attempted to serve papers upon Sergeant Charles Baldridge for a civil case involving an individual named Nancy Knies. Baldridge was present in the New Berlin Municipal Courtroom serving as a bailiff. When Currier first approached Baldridge, the officer refused to accept the papers Currier presented to him. Later, in a second attempt, Currier approached Baldridge in the courtroom from behind, this time striking Baldridge and announcing, "You're served." After Currier struck Sergeant Baldridge, the officer turned and informed Currier that he was under arrest. The striking of Officer Baldridge was confirmed by independent witnesses.

Later, when Currier was being taken to the police station, he dropped to his knees before a group in the hallway and called out, inciting persons in the gathering crowd. Currier testified that the officers helped him up immediately and never mistreated him or abused him. During the ensuing disturbance, Braun was arrested. Both were prosecuted.

At a probable cause hearing in the Circuit Court of Waukesha County on April 30, 1986, Judge Roger P. Murphy found probable cause for all criminal charges against Currier, and therefore, denied Currier's Motion to Dismiss. As the judge stated:

> The Court is satisfied all three counts set forth in the criminal complaint are supported by facts set forth in the criminal complaint, and the Court would therefore deny the motion to dismiss the complaint on the grounds that the complaint fails to set forth probable cause. The Court finds that the complaint does set forth sufficient facts for a neutral, detached magistrate to have the three counts set forth in the criminal complaint.

Judge Murphy also denied Currier's Motion to Dismiss for unlawful arrest. Consequently, the prosecution was allowed to proceed on all charges. Those charges consisted of one charge of disorderly conduct for the incident where Currier struck Sgt. Baldridge, one charge of obstructing a police officer for running from Sergeant Baldridge rather than submitting to the arrest, and one charge of disorderly conduct for the fall and call he made, which tended to provoke a disturbance.

Currier's case went to trial on October 7, 1986. During the course of the three-day trial, the judge and jury heard testimony from numerous witnesses, seven (7) by the prosecution and fifteen (15) by the defense (including Robert Braun, Al Feustal and William Currier).

At the close of the state's case, Currier moved for a directed verdict and dismissal of the charges against him. Judge Murphy denied the motion and stated:

> The court is satisfied from the testimony that it's heard the state has more than met the burden of proof of prima facie, that there is sufficient evidence to support the charges against the - charges against the defendant, the court finds through the testimony even beyond probable cause as far as this court's concerned.
>
> The motion of the defendant is denied at this time.

At the close of all evidence, Currier again moved for directed verdict and dismissal. The circuit court found that the state had presented sufficient evidence to warrant submission of the charges to the jury; therefore, Judge Murphy denied Currier's motion. The jury returned a verdict of guilty on the second disorderly conduct charge.

Currier availed himself of the appellate procedures of the State of Wisconsin challenging his conviction on 13 different grounds. Two of the unsuccessful grounds for appeal were "no probable cause to arrest" and "insufficient evidence to convict." The Wisconsin Court of Appeals rejected all of his arguments. [Respondents' Appendix pp. A-1-A-9]. Currier's petition for review to the Wisconsin Supreme Court was rejected on June 14, 1988. The judgment of his conviction was entered on August 22, 1988.

Robert Braun

On January 28, 1987, Robert Braun's trial began in the Waukesha County Circuit Court. The counts against him

included obstructing an officer for pushing Sergeant Baldridge while he was taking Currier into custody, disorderly conduct for pushing Baldridge away while Currier was being led through the hallway, resisting an officer while being taken into custody, and criminal damage to property for a hole in the wall of the conference room. The case was litigated in a three-day trial that included four prosecution witnesses and eight defense witnesses (including William Currier, Nancy Knies and Robert Braun). At the close of the state's case, Judge Harry G. Snyder was satisfied that the state had established a prima facie case as to all four of the charges and denied the motion to dismiss. The jury returned a verdict of guilty on the second charge – that of disorderly conduct. Braun's counsel moved for dismissal based on insufficiency of evidence; that motion was denied.

Like Currier, Braun appealed his criminal conviction. His conviction was affirmed by the Wisconsin Court of Appeals on June 22, 1988. [Respondents' Appendix pp. A-10-A-12]. The Supreme Court of Wisconsin denied Braun's petition for review on August 23, 1988.

* * *

Dissatisfied with their results in the state courts, Currier and Braun filed claims in the Federal District Court of the Eastern District of Wisconsin against the arresting officers (Baldridge and Osborn) on February 19, 1989, alleging violations of their Constitutional rights, in four causes of action under 42 U.S.C. Sec. 1983. The respondents answered the Complaint, denying all liability and asserting their entitlement to immunity. After

appropriate discovery, the respondents moved for summary judgment on all counts on March 15, 1989.

On June 15, 1989, the District Court granted summary judgment in favor of the respondents on counts one and two of the plaintiffs' Second Amended Complaint. [Petitioners' Appendix at pp. 14-44]. The petitioners had abandoned their fourth cause of action based on defamation. The petitioners' remaining claims were dismissed by stipulation, with them preserving the right to appeal the decision regarding claims one and two. Count one concerned allegations of infringement on the petitioners' rights secured under the First and Fourteenth Amendments. Count two contained allegations that the respondents arrested the petitioners without probable cause to keep them from exercising their First Amendment rights and in violation of the Fourth and Fourteenth Amendments. Judgment was entered on June 16, 1989 and the petitioners appealed.

On October 1, 1990, the judgment of the District Court granting summary judgment dismissal was affirmed by the Seventh Circuit Court of Appeals [*Currier v. Baldridge*, 914 F.2d 993 (7th Cir. 1990), *reh'g denied*, December 4, 1990].

The petitioners each went through separate trials in their criminal cases. They now attempt to reargue and relitigate evidence presented and decided upon in the Wisconsin State Courts.

SUMMARY OF ARGUMENT

Respondents respectfully submit that this case does not warrant this Court's extraordinary and discretionary consideration. The lower courts have uniformly found no merit in the petitioners' arguments in the wake of two criminal proceedings. Thus, no genuine issue of material fact exists and relitigation of those issues resolved in the state courts is unnecessary. The case presents no conflicts as between the circuits nor any issue not previously resolved by earlier precedent.

Therefore, respondents respectfully request that this Court reject the Petition for a Writ of Certiorari.

ARGUMENTS

I. FINDINGS OF PROBABLE CAUSE PRECLUDE ANY CLAIM FOR WRONGFUL ARRESTS.

In this case, probable cause was found to exist as to the arrests at every judiciary level. The District Court granted Summary Judgment on the issue of probable cause relating to the arrests, and the Seventh Circuit Court of Appeals affirmed that decision. In light of the record, petitioners offer nothing to show the respondents "exceeded" their authority. (Petition at p. 5).

Wrongful arrests are not necessarily committed where convictions are not obtained, if probable cause can be found to exist for the underlying charge. *Baker v. McCollan*, 443 U.S. 137, 145 (1979); *Pierson v. Ray*, 386 U.S. 547, 555 (1967). Once probable cause has been litigated and established, the doctrine of issue preclusion applies.

Under Wisconsin common law, the basis of a defense founded upon issue preclusion is that controlling facts and applicable legal rules remain unchanged, and matters raised are identical to those previously decided in a suit in which there exists a valid and final judgment. *Crowall v. Heritage Mutual Ins. Co.*, 118 Wis. 2d 120, 125-6, 346 N.W.2d 327, 331 (Ct. App. 1984), *pet to rev. denied* 118 Wis. 2d 829 (1984).

Issue preclusion is recognized by the U.S. Supreme Court to relieve parties of the cost and vexation of multiple lawsuits, to conserve judicial resources, to prevent inconsistent decisions and to encourage reliance on adjudications. *Allen v. McCurry*, 449 U.S. 90, 94 (1980). Under the doctrine of issue preclusion, once a court has decided an issue necessary to its judgment, that decision precludes relitigation of the issue in subsequent related cases. *Allen*, 449 U.S. at 94.

In this case, the issues of probable cause were litigated. Motions before trial and during the petitioners trials which raised the issue of probable cause were all decided adversely to the petitioners. Thus, the doctrine of issue preclusion will operate to bar an action under 42 U.S.C. Sec. 1983 for wrongful arrest when probable cause has been found to exist in the underlying arrests. *Id.*

Both of the petitioners were convicted of disorderly conduct for the events of February 19, 1986. Currier and Braun have each had their opportunity in court, each submitted numerous motions and each fully defended their cases at trial by calling numerous witnesses. Both petitioners have also availed themselves of the appellate opportunities in the Wisconsin courts. The federal courts

should not serve as an appellate forum for plaintiffs who are dissatisfied with their state court decisions. *Scherer v. Balkema*, 840 F.2d 437, 442 (7th Cir. 1988), *cert denied* 486 U.S. 1043 (1988). ("One fair opportunity to litigate an issue is enough.") As in this case, the plaintiffs in *Scherer* had been convicted and were unsuccessful on appeal. The district court and the Seventh Circuit Court of Appeals in *Scherer* properly saw no need to reconsider the issue of probable cause. *Id.* at 443. Therefore, because the issue of probable cause was conclusively determined in the state courts, the petitioners cannot now relitigate the issue in a federal court. *Allen*, 449 U.S. at 94; *Guenther v. Holmgren*, 738 F.2d 879, 889 (7th Cir. 1984) *cert denied* 469 U.S. 1212 (1985). The petitioners cannot now couch their claim in alleged violations of Due Process simply because they have received an adverse decision at every available judiciary level.

Petitioners' attempt to relitigate issues of credibility must also fail. [Petition at pages 11-15]. The petitioners argued their claims of fraud, fabrication, and perjury on the part of the police officers in their criminal trials, a forum in which they each had every incentive to vigorously litigate these issues. There may have been a difference of opinion on recollections of facts as among all witnesses. However, the testimony of the respondents was supported by independent witnesses. Hence, the prosecution and conviction of each of the petitioners had a basis independent from the testimony of the respondents alone. In reaching their verdicts, petitioners' respective juries necessarily decided the issues of credibility surrounding the incidents which gave rise to their

arrests. Thus, the petitioners are precluded from rearguing the issue of credibility.

II. THE ACT OF SERVING PLEADINGS DOES NOT INSULATE ONE FROM THE CONSEQUENCES OF CRIMINAL VIOLATIONS.

The petitioners are now attempting to wrap themselves in the First Amendment as an excuse for conduct which has been decided by two state courts and two federal courts as conduct that has provided a basis for finding probable cause.

Service of pleadings does not afford First Amendment protection for illegal acts such as disorderly conduct or striking an officer. *United States v. O'Brien*, 391 U.S. 367, 376 (1968), *cert denied* 486 U.S. 1043; *State of Wisconsin v. Minniecheske*, 118 Wis. 2d 357, 360, 347 N.W.2d 610, 611 (Ct. App. 1984), *pet to rev denied*, 121 Wis. 2d 707 (1984). The Constitution of the United States cannot be used as a vehicle for the petitioners to avoid the legal consequences of conduct which exhibits probable cause for criminal activity.

To redefine petitioners' claim, Currier was not arrested for serving process [Petition at pp. 8, 22], Currier was arrested for and charged with disorderly conduct. Thus, the arrest can be characterized not as retaliatory, but rather in response to a reasonable determination that grounds for a disorderly conduct arrest were present.

It should be noted also that Currier was not arrested the first time he attempted to serve Sergeant Baldridge. It was not until he actually struck Sergeant Baldridge that Currier was arrested. As the district court noted:

> . . . the record shows that Currier made two attempts to serve Officer Baldridge. He was arrested after the second attempt only because he struck Officer Baldridge. The First Amendment does not protect illegal acts such as disorderly conduct or striking a police officer merely because the actor claims to be attempting to serve legal papers. (citations omitted).

District Court Decision and Order of 06/15/89 (Petitioners' Appendix at p. 25).

Although the First Amendment protects the right to associate and the right to advocate, the Constitution does not guarantee the effectiveness of such actions. *Smith v. Arkansas State Highway Employees*, 441 U.S. 463, 464-5 (1979). The First Amendment protects individuals from retaliation for the exercise of their First Amendment rights to associate and to speak freely and petition openly. *Id.* "But the First Amendment does not impose any affirmative obligation on the government to listen, to respond, or in this context, to recognize the association and bargain with it." *Id.*

In this case, the record does not support a finding that protected conduct was implicated; nor that the arrest was a "retaliation" (Petition at p. 8). As the district court noted:

> The plaintiffs have not produced a scintilla of evidence or even raised a reasonable inference that protected conduct was a motivating factor in their arrests.

District Court Decision and Order of 06/15/86 p. 9; (Petitioners' Appendix at p. 27). If the petitioners have been "unsure" about what they can anticipate concerning activities which give rise to probable cause for criminal

conduct, [Petition at p. 24] this case should satisfy them that these activities may not proceed without consequence.

III. APPROPRIATE APPLICATION OF SUMMARY JUDGMENT STANDARDS LED TO A DISMISSAL OF PETITIONERS' CLAIMS.

Rule 56(b) of the Federal Rules of Civil Procedure provides that summary judgment may be granted where there is "no genuine issue as to any material fact." This Court has held that summary judgment rules do not require the moving parties to produce evidence to negate the non-moving parties' claims. Rather, the non-moving party must sustain its own burden of establishing its claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986), *cert denied* 484 U.S. 1066 (1988).

The petitioners fail to show that the issues central to their claims against Sergeant Baldridge and Corporal Osborn have not been resolved by prior proceedings. Any dispute over any other alleged factual issues is immaterial because "a complete failure of proof concerning an essential element of the non-moving parties' case necessarily renders all other facts immaterial." *Celotex*, 477 U.S. at 323. The standards followed by the Federal District Court and the Court of Appeals for the Seventh Circuit specifically track those of this Court and no record for a "departure" has even been suggested. [Petition at pp. 9-10]; *Currier v. Baldridge*, 914 F.2d 993, 996 (7th Cir. 1990), [citing to *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986), *cert denied* 484 U.S. 1066 (1988); *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 249-50 (1986)]. There is no "new

standard for probable cause" in this case as the petitioners allege (Petition at p. 15). The lower courts' rulings are merely the logical response to prevent petitioners from continually retrying their case in multiple forums.

The district court recognized that the petitioners had not presented a factual showing to support their First Amendment claims. Moreover, the Court of Appeals for the Seventh Circuit found that the record did not support a finding that the arrests of Currier and Braun were unreasonable or without probable cause. This Court need not look any further than the analysis contained below to conclude that the petitioners continue to pursue a claim without any basis.

The general theme of their petition involves vague allegations and unsupported assertions of protected conduct. The petitioners' claim that the courts did not afford them a fair consideration of "unsworn declarations," associated with their status as "Christian Activists." (Petition at p. 8-10, 17-21). They show nothing to indicate the lower courts "ignored" relevant evidence, (Petition at p. 7) in light of the fact that the petitioners were free to call, and did call, witnesses in the criminal trials. Thus, the petition raises no issue that needs to be considered by this court.

In addition to the lack of merit for these claims, the petitioners procedurally have not laid a foundation for them in the lower courts. These issues could have been raised prior to this petition but they were not so raised. Where no exceptional circumstances are presented, the respondents respectfully submit that this Court not review questions which were neither raised before nor

considered by the United States Court of Appeals for the 7th Circuit. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 148, n.2 (1970).

CONCLUSION

The petitioners have failed to demonstrate a sufficient foundation for their request that this Court grant their petition. For the reason stated in this response and upon the rationale of the lower court decisions, these respondents respectfully request that the Petition For The Issuance of A Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX
OF
RESPONDENTS

No. 87-1746-CR

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

WILLIAM E. CURRIER,

Defendant-Appellant.

(DATED AND RELEASED MAY 11 1988)

APPEAL from a judgment and an order of the circuit court for Waukesha county: ROGER P. MURPHY, Judge.

Affirmed.

BROWN, P.J. William E. Currier appeals from a judgment of conviction on one count of disorderly conduct, contrary to sec. 947.01, Stats. Currier raises thirteen issues challenging his conviction. We reject all of Currier's arguments and affirm.

Currier argues that the trial court acted like an admiralty court, failing to establish jurisdiction over him and not recognizing his challenges to both subject matter and personal jurisdiction.

There is no burden on the court to prove jurisdiction. Here, both subject matter and personal jurisdiction are obvious upon even a cursory review of the record. A court has subject matter jurisdiction if it has the power to hear the kind of action brought. *State v. Olexa*, 136 Wis.2d 475, 479, 402 N.W.2d 733, 735 (Ct. App. 1987). Circuit

courts in Wisconsin are courts of general jurisdiction and have original subject matter jurisdiction over civil and criminal matters not excepted in the constitution or prohibited by law. *Id.*; Wis. Const. art VII, sec. 8. In this case, the criminal complaint alleged violations of secs. 947.01 and 946.41(1), Stats., and set forth sufficient facts to inform Currier of the nature of the charges against him. The actions against Currier are not excepted by the constitution or other law. Therefore, the trial court had subject matter jurisdiction to hear the action. *Olexa*, 136 Wis.2d at 479, 402 N.W.2d at 735.

The trial court also had personal jurisdiction over Currier. Personal jurisdiction assures that the defendant has a sufficient relationship to the jurisdiction exercising authority and that the defendant has notice of the charges. *Id.* at 479-80, 402 N.W.2d at 735. The alleged offenses took place in Wisconsin, thereby subjecting Currier to state prosecution. Sec. 939.03(1)(a), Stats. The action was commenced pursuant to a complaint under sec. 967.05(1)(a), Stats. Therefore the requisites of personal jurisdiction are satisfied. *Olexa*, 136 Wis.2d at 480, 402 N.W.2d at 735-36.

Currier attacks the constitutionality of sec. 947.01, Stats., arguing that it is "vague and overly broad." Our supreme court has previously determined that sec. 947.01 sufficiently identifies the type of behavior which the legislature intended to be contrary to law and that the statute is not subject to attack for vagueness or overbreadth. *State v. Zwicker*, 41 Wis.2d 497, 507-511, 164 N.W.2d 512, 517-19, *appeal dismissed*, 396 U.S. 26 (1969); *see also State v. Maker*, 48 Wis.2d 612, 615-16, 180 N.W.2d 707,

708-09 (1970), *cert. denied*, 401 U.S. 1013 (1971). That decision is binding on this court and therefore we find the questioned statute constitutional. *See State v. Kennedy*, 134 Wis.2d 308, 315, 396 N.W.2d 765, 767 (Ct. App. 1986).

Currier claims that he was denied "the practice of admission to bail," thereby "suppressing" his ability to prepare a defense. This contention is without merit; there was no denial of bail. The record shows that at Currier's initial appearance, the trial court authorized Currier's release pursuant to ch. 969, Stats. The court set a cash bail in the amount of $500 or, as an alternative, a $1,000 signature bond, with conditions on both that Currier advise the court of any address or employment change, that he make all future appearances, and that he comply with all processing requirements of the county jail. Currier stated to the court that "I don't intend to meet those conditions" and remained in jail for twenty-two days, at which time he signed the signature bond. Any delay in Currier's release resulted not from the trial court's actions but from Currier's own refusal to comply with the reasonable conditions set by the court.

Currier next argues that the trial court "ignored" a demand for a John Doe hearing, contending that the hearing would have shown misconduct in office by the arresting police officer. It was determined below that the request for a John Doe hearing was not properly made. Further, the record shows that it was not Currier who requested a John Doe hearing, but rather a third party, whom Currier now on appeal terms his "next friend of court." Currier therefore lacks standing to challenge the court's disposition of the matter. *See Joint School Dist. No.*

l v. Wisconsin Rapids Educ. Ass'n, 70 Wis.2d 292, 302, 234 N.W.2d 289, 296 (1975).

Moreover, a John Doe hearing into the allegations of misconduct in office against the arresting officer would have no relevance to the disorderly conduct charges against Currier. The John Doe hearing would focus on whether the officer acted improperly. Any such finding would have no bearing on whether Currier committed the offense of disorderly conduct.

Currier alleges that his right to counsel was abridged because the trial court failed to obtain a proper waiver of counsel and forced him to proceed with the trial absent counsel. The record indicates that prior to his trial, Currier had two attorneys. The first was an attorney of Currier's own choice. The second was appointed by the public defender's office but was allowed to withdraw due to a "conflict . . . regarding the defense of this matter," and "irreconcilable" differences. Currier was then warned of the upcoming trial date, subsequently appeared *pro se* at two motion hearings, and was again warned at each hearing of the impending trial date.

On the day of the trial, despite these warnings, Currier appeared *pro se*. At voir dire, Currier asked prospective jurors, "[d]oes it bother you in any way that I'm representing myself without an attorney?" He then asked the prospective jurors if they had heard the phrase "he who defends himself has a fool for a client" and asked several jurors for "the reasoning behind why you feel that I would be a fool being my own client." During his opening statement, Currier stated to the jury that he would not get into the reasons for his not having an

attorney "except the cost," and to state that the public defender was not the answer. Then, on the afternoon of the second day of trial, Currier made an oral motion "to dismiss on the grounds that I have not been represented by counsel." The trial court, in the exercise of its discretion, denied the motion.

The right to counsel cannot be manipulated in this manner so as to obstruct the orderly procedure of the courts or to interfere with the administration of justice. *State v. Scarbrough*, 55 Wis.2d 181, 187, 197 N.W.2d 790, 793 (1972). Here, Currier had counsel, but apparently they were unable to provide representation to his liking. Currier was repeatedly forewarned of the pending trial date and advised to seek counsel. When that date arrived, Currier delayed his motion for counsel until the second day of trial. Currier, by his own actions, has waived counsel. *Pickens v. State*, 96 Wis.2d 549, 564-65, 292 N.W.2d 601, 609 (1980). The record reflects that he knew exactly what he was doing and that his choice was made with his eyes wide open – any claim to the contrary is nothing short of ludicrous. *Id.* at 565, 292 N.W.2d at 609.

Currier also argues that the trial court erred in failing to consolidate his case with that of Robert Braun's. Braun was arrested during the disturbance caused by Currier's arrest. The granting or denying of a motion for consolidation is entirely within the sound discretion of the trial court. *State v. Shears*, 68 Wis.2d 217, 234, 229 N.W.2d 103, 112 (1975). Here, Braun's case and motion to consolidate were before a different branch of the circuit court. As a result, the trial court lacked the authority to order the cases consolidated and did not abuse its discretion in denying Currier's motion.

Further, while a defendant possesses many rights – such as trial by jury, the right to counsel, the right to refrain from self-incrimination, the right to due process of law and the right to a speedy trial – Currier has not shown us, and we have not found, authority establishing a defendant's right to joinder or consolidation of cases.

Currier challenges the denial of his motion for pretrial discovery. He claims he was denied access to "specific names and addresses" in the possession of the New Berlin Police Department. Currier's "demands" for discovery took place in the form of written interrogatories, letters, and verbal communications. Such "demands" are not within the purview of sec. 971.23, Stats.,[1] and thus were properly denied. Moreover, the record indicates that the names and addresses in question were readily available to Currier as public records of the New Berlin Municipal Court. It was Currier's obligation to seek out those records, not the obligation of the police to gather and provide him with the requested information. *See State v. Chacon*, 50 Wis.2d 73, 77, 183 N.W.2d 84, 86 (1971).

Currier also alleges that the failure to provide him with these names and addresses constituted the concealment of exculpatory evidence. We are not so persuaded. There is no claim that the district attorney knew the content of the testimony these prospective witnesses might give; consequently, the district attorney could hardly be suppressing evidence. *See id.* at 76-77, 183 N.W.2d at 86.

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[1] The record shows that Currier made requests pursuant to sec. 971.23, Stats., which were readily complied with.

Counts one and three of the criminal complaint charged Currier with disorderly conduct arising out of his acts at the New Berlin Municipal Court. Currier contends that these charges are multiplicious because they arise from a single series of events.

Charges arising from the same general episode are not multiplicious if the acts allegedly committed by the defendant are so significantly different in fact that they may be denominated separate crimes, even though constituting a violation of the same statute. *See State v. Eisch*, 96 Wis.2d 25, 34, 291 N.W.2d 800, 805 (1980).

Count one of the complaint charged Currier with disorderly conduct for his alleged actions of running up behind a police officer in the courtroom and striking that officer in the kidney area with his fist, yelling out "you're served." These actions incited a crowd of twenty to twenty-five onlookers, many of whom were known to Currier, to cheer and yell, creating a disturbance within the court.

Following this episode, Currier was subdued, arrested and placed in a conference room while additional officers were summoned for his transportation to the police department. After these officers arrived, the actions giving rise to count three of the complaint took place. Currier was being led out of the conference room by two officers when he began screaming, fell to his knees, and then began kicking and struggling with the officers. These actions incited the crowd of onlookers to become hostile, shouting obscenities and yelling at the police officers.

From this synopsis of the charges, it can easily be seen that counts one and three of the complaint are so significantly different in fact that they may be denominated separate crimes.

Currier next challenges the sufficiency of the evidence to support his conviction on count three of the complaint and the trial court's denial of his motion to dismiss for lack of evidence at the close of the case. A conviction will be upheld if the evidence adduced, believed, and rationally considered by the jury is sufficient to prove the defendant's guilt beyond a reasonable doubt. *State v. Daniels*, 117 Wis.2d 9, 17, 343 N.W.2d 411, 415 (Ct. App. 1983). We view the evidence in the light most favorable to the state. *State v. Wyss*, 124 Wis.2d 681, 693, 370 N.W.2d 745, 751 (1985).

The evidence shows that while he was being escorted by two police officers, Currier "pretended to go limp" fell to the ground, started to scream and moan, and struggled with the police officers, "kicking like a little kid." Currier's actions took place before the same crowd of twenty to twenty-five onlookers that had previously cheered him when he allegedly struck the police officer in the kidney area. The actions were described as "inciting the other people to come forward to involve themselves with the disturbance that was occurring." As a result of Currier's actions, these people did become excited and began yelling obscenities, "heckling" the police officers, such that the supporters had to be held at bay with a police dog. Even so, one supporter became engaged in a struggle with the police, shoving an officer who was attempting to control Currier. Additional officers then had to be

called to control what one witness described as "a minor riot."

From this evidence, the jury could easily conclude that there was "violent," "unreasonably loud, or otherwise disorderly conduct," which under the circumstances tended to "cause or provoke a disturbance" satisfying the elements of sec. 947.01, Stats. *See* Wis J I – Criminal 1900.

Currier also argues that there was no probable cause to arrest him, that there was jury tampering and that the trial court was biased against him. On each of these issues, Currier has made no argument, instead stating that "argumentation on this issue is held in abeyance."

An appellate court is not a performing bear, required to dance at each and every tune played on an appeal. *State v. Waste Management of Wisconsin, Inc.*, 81 Wis.2d 555, 564, 261 N.W.2d 147, 151, *cert. denied*, 439 U.S. 865 (1978). Issues raised but not argued on appeal or issues raised without reference to legal authority will not be considered. *See State v. Shaffer*, 96 Wis.2d 531, 545-46, 292 N.W.2d 370, 378 (Ct. App. 1980). A review of the record shows that these issues lack sufficient merit or importance to warrant individual attention. *Waste Management*, 81 Wis.2d at 564, 261 N.W.2d at 151.

By the Court. – Judgment and order affirmed.

Not recommended for publication in the official reports.

No. 88-0031-CR

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROBERT C. BRAUN,

Defendant-Appellant.

(DATED AND RELEASED JUNE 22 1988)

APPEAL from a judgment and an order of the circuit court for Waukesha county: HARRY G. SNYDER, Judge.

Affirmed.

BROWN, P.J. Robert C. Braun was convicted of disorderly conduct. On appeal, he points to evidence that he was both verbally and physically abusive. The trial court gave a disjunctive instruction, telling the jury that a defendant commits disorderly conduct when engaged in, *inter alia*, violent, unreasonably loud, or otherwise disorderly conduct.

Braun asserts that this disjunctive instruction informs the jury that he can be found guilty either upon his physical acts or his language. He argues that the instruction violates his right to a unanimous verdict because jurors can disagree on which *actus reus* behavior occurred but can still agree on ultimate guilt.

The state notes that there was no objection to the instruction and argues waiver. Based on *State v. Schumacher*, No. 86-0499-CR slip op. (Wis. June 9, 1988), this court agrees with the state.

Up until now, there was a conflict in the law between published decisions of the court of appeals that had been unresolved by our supreme court. In *State v. Olsen*, 99 Wis.2d 572, 582-83, 299 N.W.2d 632, 637-38 (Ct. App. 1980), failure to object to the disorderly conduct instruction at trail as depriving a defendant of his right to a unanimous jury verdict was held to constitute waiver.

However, in two other cases, a different panel of the court of appeals held that the right to a unanimous jury verdict is so fundamental that it can never be waived. *State v. Koput*, 134 Wis.2d 195, 204, 396 N.W.2d 773, 777 (Ct. App. 1986), *rev'd on other grounds*, 142 Wis.2d 370, 418 N.W.2d 804 (1987); *Holland v. State*, 87 Wis.2d 567, 597-98, 275 N.W.2d 162, 177 (Ct. App.), *rev'd on other grounds*, 91 Wis.2d 134, 280 N.W.2d 288 (1979), *cert. denied*, 445 U.S. 931 (1980).

We hold that *State v. Schumacher* has resolved the conflict. That case dealt with a unanimity argument based on allegedly erroneous jury instructions. The court inferentially held that this issue can be waived. What's more, it held that the court of appeals is without discretion to decide the merits when there is waiver. *Id.*, slip op. at 24-25.

Based on *Schumacher*, this court holds that the statements in *Holland* and *Koput* are wrong. Questions regarding the right to a unanimous jury verdict brought about by an allegedly erroneous jury instruction *are* subject to

waiver. There having been no objection to the instructions given here, the issue was waived.

We are forbidden to reach the merits of the issue in our discretion. Defendant's remedy at this point is to petition the supreme court for review since that court alone has the discretion to reach the merits in this case. *See Schumacher,* slip op. at 5 (Abrahamson, J., concurring).

Braun also claims that he was denied due process and a fair trial when the prosecutor improperly cross-examined him about whether other witnesses lied. There was no objection at trial on these grounds. This issue is waived as well.

By the Court. – Judgment and order affirmed.

Not recommended for publication in the official reports.

(4)

No. 90-1392

Supreme Court, U.S.
FILED
APR 9 1991
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

WILLIAM E. CURRIER and
ROBERT C. BRAUN,

PETITIONERS,

VS.

CHARLES J. BALDRIDGE and
ROBERT DALE OSBORN,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITIONERS' REPLY BRIEF

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Case No. 90-1392

PETITION FOR WRIT OF CERTIORARI
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REBUTTAL

Petitioners appear herein pursuant to Rule 15.6, RULES OF THE SUPREME COURT of the UNITED STATES, to oppose arguments first raised in BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI (Resp. Brief) filed on March 22, 1991.

Petitioners take exception to the following statements in Resp. Brief as being misleading and detractive of the issues presented by petitioners in their PETITION filed on March 4, 1991.

Page 2 of Resp. Brief states:

> "The striking of Officer Baldridge was confirmed by independent witnesses."

and on page 9 they said:

> "However, the testimony of the respondents was supported by independant witnesses."

These are misleading statements because in fact, <u>all</u> eye witnesses who testified supported Currier's claim that contact of the process paper service was upon

Sgt. Baldridge's arm. That is, all the witnesses except Sgt. Baldridge. Some of these eye witnesses provided "Asseveration" statements to the court below describing this contact as a "touching on the arm".

This only helps elucidate the real "genuine" issue in this drama, i.e. whether or not the subjective verb "strike" herein was of such magnitude that it could be construed as "violence" necessary to meet the criteria called for in Wisconsin Statute Section 947.01. And, did Sgt. Baldridge fabricate "pain in the kidney area" caused by "fist and papers" when he swore to the truth of that matter in front of the prosecuting Assistant District Attorney who endorsed the Criminal Complaint on the assumption that violence occurred? And, did the criminal trial acquittal of Currier establish that Sgt. Baldridge's bizarre claim of violence had no basis in fact? Excerpts of criminal trial transcripts

from petitioners' trials were used in support of their claims that false swearing by Sgt. Baldridge occurred at the criminal trials. How could there be "...not a scintilla of evidence..." to support their claims when petitioners supplied this kind of evidence to the court below that denied the existance of evidence?

Petitioners concede that if violence did in fact occur, then the criminal trial court's finding of probable cause to arrest might stand. But the absence of violence is a genuine issue in dispute here. Reasonable cause based upon one officer's testimony must disappear when several witnesses testify contradictory facts that a jury finds more credible and acquits on the violence issue.

****

Petitioners take exception to the misleading arguments on relitigation on pages 4, and 8 - 9 of Resp. Brief wherein

they fail to mention that the criminal trial appeal arguments concerned only one Disorderly Conduct charge for which Currier and Braun were each convicted. Sgt. Baldridge endorsed (under penalty of perjury) the Criminal Complaints of seven charges against petitioners, five of which fell by acquittal. Petitioners have claimed that it was the respondents who instigated and contrived all arrests after the seizure of Currier, notwithstanding petitioners convictions which resulted from that trap.

The merits of the probable cause to arrest Currier and Braun for the charges for which they were convicted have been purposely avoided by petitioners in this lawsuit notwithstanding the multiplicitous nature of those charges and the motivating nexus between those convictions and the initial arrest that fell by acquital. Arguing over the merits of conviction now would be an effort in futility. Instead petitioners have proffered evidence to show

that the alleged reasonable cause to arrest for the initial seizure on February 19, 1986, was destroyed by Currier's exoneration of the violence charge in the Criminal Complaint. Respondents claim of relitigation attempts by petitioners has no basis in fact beyond Currier's initial seizure which is bereft of legitimate cause. What caused Currier's seizure arrest was probably retaliatory spleen. Therefore, the last paragraph on page 6 of Resp. Brief is also untrue.

****

Petitioners take exception to the statement on page 7 of Resp. Brief that claims:

> "In light of the record, petitioners offer nothing to show the respondents 'exceded' their authority".

This statement is confusing because false swearing to affect an arrest warrant and seizure arrest without reasonable cause certainly are in excess of authority, and

the record proffered by petitioners in Question # 1 and argued on pages 11 - 15 of the PETITION show respondents culpability. Perhaps the rules require a direct quotation of declarants to "show" a dispute exists rather than stating just where those declarations had been presented as evidence to the courts below. These declarations were presented within "Asseveration" copies in the appendix of petitioners' briefs to both of the courts below. The RULES OF THE SUPREME COURT of the UNITED STATES prevent photocopying of documents, so those documents could not be included within the appendix of this PETITION. Some of the declarations within the Asseverations presented to the courts below are therefore provided verbatim now: UNITED STATES DISTRICT COURT - EASTERN DISTRICT OF WISCONSIN, Case No. 88-C-191, ASSEVERATION IN SUPPORT OF PLAINTIFFS' BRIEF IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT, filed April 11, 1989, NANCY KNIES

HEREBY ASSEVERATES AND STATES AS FOLLOWS:

1. That her sincerely held religious beliefs compel this Asseveration to supercede the customary "sworn affidavit" to comply with Scripture, (citations omitted);

...4. That she has complained to New Berlin Police Chief Michael R. Hanrahan during a conference in his office prior to February 19th, 1986 regarding discourteous, authoratarian, and deceptive actions of certain New Berlin Police Officers. That Sgt. Charles J. Baldridge was mentioned to Chief Hanrahan during their conversation as one of the offending officers.

5. That on or about February 13th, 1986, she mailed a three page "COUNTERCLAIM" in a civil action, with her return address clearly printed on the envelope, to Charles J. Baldridge at his home residence. The envelope was returned unopened. The envelope was marked, "Refused Return to Sender".

...7. That she met William E. Currier while he was a West Allis Police Officer many years ago, knew him well and knew that he was familiar with legal procedures.

8. That William E. Currier was in the New Berlin Municipal Courtroom on February 19th, 1986, at about 8:30 PM, where she spoke to him about the "COUNTERCLAIM" naming Charles J. Baldridge as a party, and that she asked Mr. Currier to serve those legal papers upon Mr. Baldridge,...

9. That Charles J. Baldridge was in the New Berlin Municipal Courtroom in their visible presence for about 15 minutes prior to court recess, including the time she spoke to Mr. Currier.

...11. That Mr. Currier told her that when he attempted to serve Mr. Baldridge he refused to accept service, saying he didn't want the papers.

12. That she and her husband then advised Mr. Currier that he could simply touch Mr. Baldridge with the legal papers and Mr. Baldridge would then be considered legally served.

13. That as Mr. Baldridge reentered the courtroom, prior to court reconvening, she saw Mr. Currier walk up to Mr. Baldridge, touch him on his upper arm with the legal papers, drop them at his feet and announce that Baldridge was served.

14. That immediately after being served, and without hesitation, Mr. Baldridge turned to face Mr. Currier and she heard him say, "Now you're under arrest!"

...17. That she watched the entire episode from the time Mr. Currier touched Mr. Baldridge with the legal papers until Mr. Baldridge led Mr. Currier out of the courtroom in handcuffs, and that at no time did she see Mr. Currier or Mr. Braun strike or push Mr. Baldridge.

...20. That she was standing close to Robert Braun in the lobby area of City Hall when Mr. Currier fell as he was being led handcuffed amongst those of us in the lobby.

21. That she heard Robert Braun exclaim something concerning police treatment of William Currier as he fell.

22. That she then watched Robert Braun, and although Mr. Braun did nothing physical to provoke the police, she saw two police officers seize Mr Braun, force him to his

knees over a bench and pull his arms behind his back to handcuff him.

...Dated April 1, 1989, Signed Nancy Knies

...CERTIFICATION, Affirmed and Subscribed, State of Wisconsin, Milwaukee County...

We, the undersigned, all know Nancy Knies personally and witnessed her affirm and sign this Asseveration in our presence on April 1, 1989. /S/ /S/ /S/

[authority quoted] [citations omitted]

These claims contradicted the Criminal Complaint, a copy of which is shown in the appendix of petitioners brief to the court below, wherein Sgt. Charles J. Baldridge claimed:

> "Sergeant Charles Baldridge, City of New Berlin Police Department, being first duly sworn, on oath, upon information and belief, says that:
>
> COUNT #1 D.C.
> On February 19, 1986, at approximately 8:43 p.m, at New Berlin City Hall, at 3805 S. Casper Drive, City of New Berlin, Waukesha County, Wisconsin, the defendant, William E. Currier, did:
>
> in a public place engage in violent or otherwise disorderly conduct in that the defendant did strike uniformed police officer Charles Baldridge of the New Berlin Police De-

partment under circumstances in which such conduct tended to cause or provoke a disturbance, contrary to Section 947.01 Wisconsin Statutes."

...

"Subscribed and sworn to before me this 20th day of February, 1986."

"/S/
Assistant District Attorney"

These are but a small portion of the documents presented in appendixes of petitioners' briefs to the courts below and respondent is entirely incorrect in several of their statements, e.g.:

"The general theme of their petition involves vague allegations and unsupported assertions of protected conduct."

and,

"They [petitioners] show nothing to indicate the lower courts 'ignored' relevant evidence, in light of the fact that the petitioners were free to call, and did call, witnesses in the criminal trials."

and,

> "These issues could have been raised prior to this petition but they were not so raised."

These statements are untrue and/or misleading. They are typical of the general animadversions used frequently in Resp. Brief that amount to misrepresentation. Respondents' counsel is fully aware of all the facts within petitioners' appendixes to the courts below yet Resp. Brief suggests otherwise.

On page 10, Resp. Brief, they continue to promote error adopted by the courts below, i.e.:

> "Service of pleadings does not afford First Amendment protection for illegal acts such as disorderly conduct or striking an officer."

Respondents continue to try to mislead on this point. For the umpteenth time: CURRIER WAS ACQUITTED OF THAT CHARGE! Baldridge said "strike" but petitioners used the word "touch" to describe the contact that precipitated this maze.

****

Petitioners take exception to arguments on page 12 of Resp. Brief, particularly the statement:

> "The standards followed by the Federal District Court and the Court of Appeals for the Seventh Circuit specifically track those of this Court and no record for a 'departure' has even been suggested."
> "...[citing to Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986), ...Anderson v. Liberty Lobby Inc., 477 U.S. 242, 249-50 (1986)]"

The reliance by the court below on Celotex Corp. v. Catrett, id, and Anderson v. Liberty Lobby Inc., id, can only be explained by surmising that petitioners "Asseveration" declarations were disallowed as being unacceptable. Declaratory evidence that manifests fraud and false swearing by the complaining police officer to affect arrest certainly would have been addressed by the courts below if it were considered. When the court said petitioners had "...not produced a scintilla of

evidence...", the only conclusion one can reach is that this was legalese, meaning rejection of petitioners form of evidence. Are we to now adopt a new meaning for the term "genuine"?

Another exception that petitioners must address concerning this concept is on page 7, Resp. Brief, where they claim:

> "...no genuine issue of material fact exists..."

Respondents have suggested that the issue of "credibility" was decided at the criminal court proceedings. Petitioners would agree that exoneration on five of the seven criminal counts against them certainly reflects on respondents credibility. Petitioners have abandoned (because of complexity) attacking the reasonable cause to arrest on six of those counts. Proof exists that there was a complete absence of legitimate cause for Currier's initial arrest, and notwithstanding the trial court's finding of probable cause based on the

Criminal Complaint that swore to Currier's violence, his acquittal on that charge establishes that false swearing was at least a possibility, a possibility that becomes a "genuine" issue of material fact in dispute.

****

The only reference in Resp. Brief to Question # 3 of the PETITION is on page 13, where respondents state:

> "They show nothing to indicate the lower courts 'ignored' relevant evidence."

This is not true! To clarify the PETITION argument at page 7 on this issue, petitioners provide this axiomatic analysis: Assuming that the declared statements, etc., within the appendixes of petitioners' briefs, filed with the case file records in the courts below, did manifest false swearing and the absense of reasonable cause for the seizure arrest of Currier, this Court then must determine if the courts failure to address unsworn declar-

atory evidence, under the circumstances presented herein, is reversable error.

This is an important issue! The courts below have raised duel questions, i.e.: 1) based upon the record before them, was there "...not produced a scintilla of evidence..." to support petitioners' claims, as the District Court maintained and the Seventh Circuit Court digressed in addressing, or; 2) did these courts correctly disallow unsworn "Asseveration" statements which contradict the police officer's sworn claim of violence to support probable cause to arrest?

If petitioners' "Asseveration" (in lieu of affidavit) statements were disallowed by the courts below, than a disparity does exist, at least between the Ninth Circuit Court of Appeals, wherein the court, in Gordon v. Idaho, 778 F2d 1397 (1985), allowed unsworn testimony to become evidence based upon sincerely held religious belief against oathtaking in a similar

matter.

The preclusion by the courts below of unsworn "Asseveration" statements would be a "...decision in conflict with another United States Court of Appeals on the same matter..." [Rule 10.1(a)] which would merit attention by the High Court. This conflict is applicable only if false swearing to affect arrest is a "genuine" issue.

****

Petitioners take exception to respondents claim on page 7, Resp. Brief:

> "The District Court granted Summary Judgment on the issue of probable cause relating to the arrests, and the Seventh Circuit Court of Appeals Affirmed that decision."

This is not entirely true! What the Seventh Circuit Court said was:

> "Contrary to the defendants' assertion, the conviction does not collaterally estop Currier from asserting the invalidity of his initial arrest."

The Seventh Circuit Court realized that "Currier's wrongful arrest claim is more

problematic", as they said in the Written Decision. The only way to provide a cause to arrest that might fit within the parameters of Wis. Stat. Sec. 947.01 was to look at the "...or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance..." provision and mold the law to fit the circumstance that gave rise to that arrest. Disregarding the matter of intent, an essential consideration in all crimes at one time, the Seventh Circuit Court ruled carte blanche that: "...<u>any</u> physical contact within a courtroom between a police officer and a private citizen would 'tend to cause or provoke a disturbance'..."! Henceforth, intent will not be a consideration when charging an accused person with the crime of Disorderly Conduct in the State of Wisconsin, if not the entire Seventh Circuit. Is this not judicial legislation of state law?

It will not be long, under the

doctrine of reductio ad absurdum, before some police officer may be found chasing an offensive person around a courtroom with the knowledge that if he can touch the offender he can affect an arrest for Disorderly Conduct to use as a lesson in attitude adjustment.

****

OVERREACH

Petitioners take exception to the first sentence on page 10, Resp. Brief:

> "Thus, the petitioners are precluded from rearguing the issue of credibility."

Petitioners have covered this concept of their recognized right to address and challenge fraud and false swearing alleged to have influenced the judicial determination that probable cause to arrest existed.

Respondents never argued the merits of the cause of Currier's seizure arrest and relied on the criminal courts judgment in examining Sgt. Baldridge's reasonableness to affect that seizure and subsequent

warrant.

When petitioners provided affidavit type statements impugning Sgt. Baldridge's credibility respondents could have, if possible, provided affidavits in opposition to those credibility destroying documents. But that would have provided their own confirmation of a fact in contention, necessitating trial on the merits. They were wise to "let the sleeping dog lie" because the Seventh Circuit Court "reached" for arguments in support of respondents' cause and provided the inescapable "any physical contact" criteria that overcame the credibility controversy (a minor consideration in todays standards of police conduct) and, presto, reasonableness was present from the beggining, even if the judge at the probable cause hearing didn't consider that "any physical contact" would suffice to force Currier to answer for his criminal conduct.

Dated April 3rd, 1991.

Signed, _____

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Cosigned, _____

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LATE DISCOVERY

Unsupported suppositions made and conclusions drawn therefrom by the court below show derision toward petitioners' beliefs that culminate in the "reach" which has prescribed petitioners' beliefs and conscience. They ignore the spirit and letter of this Court:

> "...for the heart of the First Amendment is the basic idea and notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State, (cites omitted)...and the freedom of belief is no incidental or secondary aspect of the First Amendment's protections."

Abood v. Detroit Board of Education,
431 U.S. 209, 234, 52 L.Ed.2d 261